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No. 99-312

Supreme Court, U.S.
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IN THE

Supreme Court of the United States

NORFOLK SOUTHERN RAILWAY COMPANY,
Petitioner,

v.

DEDRA SHANKLIN, Individually and as Next Friend of Jessie Guy Shanklin,
Respondent.

On Writ of Certiorari to the United States Court of Appeals for the Sixth Circuit

BRIEF FOR PETITIONER

WILEY F. MITCHELL, JR.
CELIA C. LOVELL
NORFOLK SOUTHERN CORPORATION
Law Department
Three Commercial Place
Norfolk, Virginia 23510
(757) 629-2842

CARTER G. PHILLIPS *
G. PAUL MOATES
STEPHEN B. KINNAIRD
JOHN E. FEE
SIDLEY & AUSTIN
1722 Eye Street, N.W.
Washington, D.C. 20006
(202) 736-8000

EVERETT B. GIBSON
BATEMAN GIBSON & CHILDERS, L.L.C.
1010 Cotton Exchange Building
65 Union Avenue
Memphis, TN 38103
(901) 526-0412

Counsel for Petitioner

* Counsel of Record

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QUESTION PRESENTED

Whether the court of appeals properly applied this Court's decision in *CSX Transportation, Inc.* v. *Easterwood*, 507 U.S. 658 (1993), when it held that claims of negligence based on inadequate warning devices at a railway grade crossing are not preempted even though the warning devices at the crossing were installed with federal funds under a project approved by the federal government.

LIST OF PARTIES AND AFFILIATES

CONSOLIDATED (MORE THAN 50% OWNED) SUBSIDIARIES OF NORFOLK SOUTHERN CORPORATION

Agency Media Services, Inc.
Atlantic Acquisition Corporation
Atlantic Investment Company
Norfolk Southern Properties, Inc.
Norfolk Southern Railway Company
Northern Horizons Insurance Company
Northmont Limited Partnership
NS Crown Services, Inc.
NS Fiber Optics, Inc.
NS Transportation Brokerage Corporation
Pocahontas Development Corporation
Pocahontas Land Corporation
TCS Leasing, Inc.
Thoroughbred Direct Intermodal Services, Inc.
Thoroughbred Technology and Telecommunications, Inc.
Triple Crown Services Company

Norfolk Southern Railway Company Subsidiaries

Airforce Pipeline, Inc.
Alabama Great Southern Railroad Company, The
Alabama Great Southern LLC
Atlantic and East Carolina Railway Company
Camp Lejeune Railroad Company
Central of Georgia Railroad Company
Chesapeake Western Railway
Cincinnati, New Orleans and Texas Pacific Railway Company, The
Citico Realty Company
Georgia Southern and Florida Railway Company
High Point, Randleman, Asheboro and Southern Railroad Company
Interstate Railroad Company

Lamberts Point Barge Company, Inc.
Memphis and Charleston Railway Company
Mobile and Birmingham Railroad Company
Norfolk and Portsmouth Belt Line Railroad Company
Norfolk Southern International, Inc.
North Carolina Midland Railroad Company, The
Rail Investment Company
Shenandoah-Virginia Corporation
South Western Rail Road Company, The
Southern Rail Terminals, Inc.
Southern Rail Terminals of North Carolina, Inc.
Southern Region Coal Transport, Inc.
Southern Region Materials Supply, Inc.
Southern Region Motor Transport, Inc.
State University Railroad Company
Tennessee, Alabama & Georgia Railway Company
Tennessee Railway Company
Virginia and Southwestern Railway Company
Yadkin Railroad Company

Norfolk Southern Properties, Inc. Subsidiaries

Alexandria-Southern Properties, Inc.
Arrowood-Southern Company
Arrowood Southern Executive Park, Inc.
Carlyle CA Corporation
Carlyle Development Corporation
Charlotte-Southern Corporation
Charlotte-Southern Hotel Corporation
Lambert's Point Docks, Incorporated
NKPI Management, Inc.
Nickel Plate Improvement Company, Inc., The
Norfolk Southern Industrial Development Corp.
Norfolk Southern Tower, L.L.C.
NS-Charlotte Tower Corporation
NS Gas Properties, Inc.
NS Gas Properties, II, Inc.

Sandusky Dock Corporation
Southern Region Industrial Realty, Inc.
Virginia Holding Corporation

In addition, NS also owns direct or indirect equity interest in:

Conrail Inc.
Consolidated Rail Corporation and its consolidated subsidiaries
CRR Holdings LLC
Delaware Otsego Corporation
DOCP Acquisition, LLC
Green Acquisition Corp.
New York Central Lines LLC
Pennsylvania Lines LLC and its subsidiaries.

Affiliated Companies (50% or Less Owned) or Partnerships

Ace Insurance Company
Algers, Winslow and Western Railway Company
Amtech Logistics Corporation
Augusta and Summerville Railroad Company
Beaver Street Tower Company
Belt Railway Company of Chicago, The
CK-Southern Associates
CK-Southern Associates #2 L.P.
CK-Southern Associates #3, L.L.C.
CNS Limited Partnership
Carlyle Towers, L.L.C.
Central Transfer Railway and Storage Company
Chatham Terminal Company
Chesapeake Crossing Seniors Community One, L.P.
Chesapeake Crossing Seniors Community Two, L.P.
Fiberow Partnership
1575 Eye Street Associates (Limited Partnership)

Florida East Coast Industries, Inc.
Gateway Institutional Tax Credit Fund Ltd.
Gilbert NS Lumber, LLC
Gilbert-PLC Lumber Co.
Gilbert Pocahontas, L.L.C.
Glenwood Square Shopping Center Associates, L.L.C.
Green Real Estate Company
High Point, Thomasville & Denton Railroad Company
Iowa Transfer Railway Company
Kansas City Terminal Railway Company
Martiki-Pocahontas Partnership
Midland Corporate Tax Credit Ltd.
North Charleston Terminal Company
Pace Carbon Synfuels Investors, L.P.
Peoria and Pekin Union Railway Company
Pine Brook Center Limited Partnership
Railbox Company
Railgon Company
700 North Fairfax Street Limited Partnership
Southeast Banking Corporation
Stonebridge Manor Apartments, L.P.
TTX Company
Terminal Railroad Association of St. Louis
Three Commercial Place Associates
Winston-Salem Southbound Railway Company
Woodstock & Blocton Railway Company

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Respondent.

On Writ of Certiorari to the United States Court of Appeals for the Sixth Circuit

BRIEF FOR PETITIONER

OPINIONS BELOW

The opinion of the court of appeals is reported at 173 F.3d 386 (Appendix to Petition for Certiorari ("Pet. App.") 1a). The opinion and order of the United States District Court for the Western District of Tennessee denying summary judgment to petitioner is unreported (Pet. App. 26a).

JURISDICTION

The judgment of the court of appeals was entered on April 13, 1999. A timely petition for rehearing was denied by the court of appeals on May 24, 1999. A timely petition for certiorari was filed in this Court on August 20, 1999, and was granted on October 18, 1999. The jurisdiction of this Court is invoked under 28 U.S.C. § 1254(1).

STATUTES AND REGULATIONS INVOLVED

The statutes at issue in this case are 23 U.S.C. §§ 109(e) and 130 and 49 U.S.C. § 20106 (formerly 45 U.S.C. § 434) (Pet. App. 40a-45a). The regulation at issue is 23 C.F.R. § 646.214 (Pet. App. 46a).

STATEMENT OF THE CASE

In *CSX Transportation, Inc.* v. *Easterwood*, 507 U.S. 658 (1993), this Court unanimously held that federal regulations that prescribe rules for designing "[a]dequate warning devices" installed with federal funds at railway-highway crossings, 23 C.F.R. § 646.214 (emphasis omitted), preempt state tort law claims against railroads alleging the inadequacy of those devices. In the years following, the majority of courts of appeals and state supreme courts have been faithful to *Easterwood*, and have adopted a bright-line rule that inadequate-device tort claims are preempted where federal funds participated in the installation of the allegedly inadequate warning devices under a project approved by the Federal Highway Administration ("FHWA").[1] The court of appeals for the Sixth Circuit in this case, however, refused to give *Easterwood* a "literal reading." Pet. App. 11a-12a (quoting *Shots* v. *CSX Transp., Inc.*, 38 F.3d 304, 307 (7th Cir. 1994)). In-

[1] *Ingram* v. *CSX Transp., Inc.*, 146 F.3d 858, 864-65 (11th Cir. 1998); *Armijo* v. *Atchison, Topeka & Santa Fe Ry. Co.*, 87 F.3d 1188, 1190 (10th Cir. 1996); *Hatfield* v. *Burlington N. R.R. Co.*, 64 F.3d 559, 562 (10th Cir. 1995); *Bock* v. *St. Louis Southwestern Ry. Co.*, 181 F.3d 920, 922 (8th Cir. 1999), *petition for cert. filed*, 68 USLW 3234 (U.S. Sept. 27, 1999) (No. 99-538); *Bryan* v. *Norfolk & W. Ry. Co.*, 154 F.3d 899, 903 (8th Cir. 1998), *cert. dismissed*, 119 S. Ct. 921 (1999); *Elrod* v. *Burlington N. R.R. Co.*, 68 F.3d 241, 244-45 (8th Cir. 1995); *Hester* v. *CSX Transp., Inc.*, 61 F.3d 382, 386 (5th Cir. 1995); *Lubben* v. *Chicago Cent. & Pac. R.R. Co.*, 563 N.W.2d 596, 600 (Iowa 1997); *Union Pac. R.R. Co.* v. *Sharp*, 952 S.W.2d 658, 667 (Ark. 1997).

stead, it has engrafted onto *Easterwood* an additional, unfounded prerequisite to preemption: *viz.*, specific evidence must be presented that the FHWA examined the conditions of a particular crossing and made an independent, site-specific determination as to whether the state agency has selected the proper warning device. See Pet. App. 13a, 22a. The court of appeals decision is contrary not only to *Easterwood* but also to the federal statutory and regulatory scheme as a whole, and should be reversed.

A. Historical, Statutory, And Regulatory Background.

1. *Historical Evolution Of Railroad Crossings.*

The issue of railway-highway crossing safety has evolved substantially since railroads first appeared in the United States in the 1830's. During the rapid expansion of railroads in the nineteenth century,[2] communities competed for railroad service, and allowed railroads to build their tracks across existing streets and roads at "grade" to save on capital costs. *1972 Crossings Report (Part I)* at A-3; cf. Federal Railroad and Highway Administrations, U.S. Dep't of Transportation, *Railroad-Highway Safety Part II: Recommendations for Resolving the Problem* 2 (1972) (*"1972 Crossings Report (Part II)"*) (defining a "public grade crossing" as an intersection of a railway and a public road at the same level). Crossing safety was not a significant concern; trains were few in number and moved slowly, as did highway travelers, who were usually

[2] *See* Federal Railroad and Highway Administrations, U.S. Dep't of Transportation, *Railroad-Highway Safety Part I: A Comprehensive Statement of the Problem* A3-A5 (1972) (*"1972 Crossings Report (Part I)"*); Federal Highway Administration, U.S. Dep't of Transportation, *Railroad-Highway Crossing Handbook* 1-2 (2d ed. 1986) (*"Crossing Handbook"*).

on foot, horseback, horse-drawn vehicles, or bicycles. *Crossing Handbook* at 2; *1972 Crossings Report (Part I)* at A4. During this period, state tort law came to recognize a duty of railroads to maintain crossing safety and ensure adequate warning to travelers of the possible approach of a train. See, *e.g.*, *id.*; *Continental Improvement Co.* v. *Stead*, 95 U.S. 161, 165 (1877).

With the advent of the automobile and the rapid growth of public roads, crossing accidents grew more frequent and severe; approximately 2,000 fatal accidents occurred every year in the decade of the 1920's. *Crossing Handbook* at 5, 15. Despite increased state, federal, and railroad expenditures on crossing safety, *id.* at 5; *1972 Crossings Report (Part I)* at A5, accidents persisted at unacceptably high levels throughout the middle part of this century even as railroad line mileage declined. *Crossing Handbook* at 2, 5 (annual fatalities between 1930 and 1970 ranged from 1200 to 2000); *1972 Crossings Report (Part II)* at 5; Federal Highway Administration, U.S. Dep't of Transportation, *Rail-Highway Crossings Study* 1-8 (1989) ("*1989 Crossings Study*"). The principal reason was the explosive growth of motor vehicle miles traveled, which dramatically increased the risks of crossing accidents. See *1972 Crossings Report (Part II)* at 5 (noting 25-fold increase in motor vehicle miles traveled between 1920 and 1970); *1989 Crossings Study*, at 1-5 (noting 12-fold increase in the exposure index (*i.e.*, combined railroad and highway traffic), the best measure of accident risk, during that same period); *Crossing Handbook* at 2-3.

Although this change was largely ignored by state tort law, federal and state officials grappling with crossing safety gradually came to recognize that motor vehicles had become the primary source of the hazard, and railroads should no longer bear the primary responsibility for

maintaining the safety of railway-highway crossings. In a landmark decision reflecting this shift in attitude, *Nashville, Chattanooga, and St. Louis Railway* v. *Walters*, 294 U.S. 405 (1935), this Court vacated and remanded a case for consideration of whether Tennessee's system of requiring railroads to pay 50 percent of the expense of grade separations at railway-highway crossings violated the Due Process Clause, explaining: "The railroad has ceased to be the prime instrument of danger and the main cause of accidents. It is the railroad which requires protection from the dangers incident to motor transportation." *Id.* at 422-23 (footnote omitted); see also *1972 Crossings Report (Part I)* at A14 (detailing actions of States to reduce financial burdens on railroads in state crossing-safety programs); S. Rep. No. 74-1976, at 10-13 (1936) (agreeing with *Walters* in justifying use of federal funds to improve crossing safety). Similarly, the Interstate Commerce Commission in 1964 urged greater public funding for crossing safety, remarking that

> [i]n the past it was the railroad's responsibility for protection of the public at grade crossings. This responsibility has now shifted. Now it is the highway, not the railroad, and the motor vehicle, not the train which creates the hazard and must be primarily responsible for its removal.

Prevention of Rail-Highway Grade-Crossing Accidents Involving Railway Trains and Motor Vehicles, 322 I.C.C. 1, 82 (1964); see *id.* at 87.

2. *Federal Intervention To Reduce Railroad Crossing Hazards.*

Recognizing the dangers posed by rapidly increasing automobile travel and the need for the public to take greater responsibility for crossing safety, Congress has from the inception of the federal-aid highway program

authorized States to use federal funds to improve those crossings. See Act of July 11, 1916, ch. 241, 39 Stat. 355; *1989 Crossings Study* at 1-7, 1-8; *Crossing Handbook* at 8; *Walters*, 294 U.S. at 419-21. In 1944, Congress expanded such authorizations to permit States to use up to 10% of their allotment of federal highway funds for crossing improvements. *1972 Crossings Report (Part II)* at 25.

Congress has always acted to ensure that warning devices are adequate when federal highway funds are involved in a grade-crossing project. Beginning in 1936, see Act of June 16, 1936, ch. 582, § 8, 49 Stat. 1519, 1521, Congress has forbidden the expenditure of federal funds on any portion of federal-aid or other designated highways "unless proper safety protective devices complying with safety standards determined by the Secretary at that time as being adequate shall be installed or in operation at any highway and railroad grade crossing." 23 U.S.C. § 109(e).[3] Congress has more generally provided that the Secretary of Transportation "shall ensure that the plans and specifications for each proposed highway project . . . provide for a facility that will . . . *adequately* serve the existing and planned future traffic of the highway in a manner that is conducive to safety, durability, and economy of maintenance," and will "be designed and constructed in accordance with criteria *best suited* to accomplish [those] objectives . . . and to conform to the particular needs of

[3] Under current definitions, enacted in 1991 and modified in 1998, *see* Transportation Equity Act for the 21st Century, Pub. L. No. 105-178, § 1201, 1998 U.S.C.C.A.N. (112 Stat.) 107, 164-65 (1998), a "[f]ederal-aid highway" is "a highway eligible for assistance under [Title 23, chapter 1] other than a highway classified as a local road or rural minor collector." 23 U.S.C. § 101(a)(5). Previously, the term was defined to "mean[] highways located on one of the Federal-aid systems described in section 103 of this title." *See* 23 U.S.C.A. § 101(a) (1990).

each locality." *Id.* § 109(a) (emphases added).[4] The Secretary has a further statutory obligation to ensure that any warning signs, pavement markings, and traffic signals installed in any federally funded highway project "will promote the safe and efficient utilization of the highways." *Id.* § 109(d).

3. *The Federal Railroad Safety Act.*

The 1960's brought a sharp spike in crossing fatalities, *1989 Crossings Study* at 1-5, raising the pressure on Congress to increase federal intervention to promote grade crossing safety. Troubled by the statistical trend and other safety issues, and by the inadequacy of haphazard state safety regulation, Congress enacted the Federal Railroad Safety Act of 1970 ("FRSA"), Pub. L. No. 91-458, 84 Stat. 971. See H.R. Rep. No. 91-1194, at 11 (1970) (expressing disbelief that "safety in the Nation's railroads would be advanced sufficiently by subjecting the national rail system to a variety of enforcement in 50 different judicial and administrative systems"), *reprinted in* 1970 U.S.C.C.A.N. 4104, 4109; see also S. Rep. No. 91-619, at 31 (1969) (noting lack of "uniform pattern of involvement" of the States in railway safety, and the "need for

[4] At the time of project approval in this case, section 109(a) read:

> The Secretary shall not approve plans and specifications for proposed projects on any Federal-aid system if they fail to provide for a facility (1) that will adequately meet the existing and probable future traffic needs and conditions in a manner conducive to safety, durability, and economy of maintenance; (2) that will be designed and constructed in accordance with standards best suited to accomplish the foregoing objectives and to conform to the particular needs of each locality.

23 U.S.C.A. § 109(a) (1990).

a comprehensive national approach"). The purpose of the FRSA was "to promote safety in every area of railroad operations and to reduce railroad-related accidents and incidents." 49 U.S.C. § 20101.[5] Congress vested the Secretary of Transportation with broad powers to "prescribe regulations and issue orders for every area of railroad safety." *Id.* § 20103(a); *Easterwood,* 507 U.S. at 662. In the FRSA's preemption provision, Congress unequivocally declared its intent that "[l]aws, regulations, and orders related to railroad safety shall be nationally uniform to the extent practicable." 49 U.S.C. § 20106. In keeping with this strong policy of federalization, Congress only permitted States to "adopt or continue in force any law, regulation, or order related to railroad safety until the Secretary of Transportation prescribes a regulation or issues an order covering the subject matter of the State requirement." *Id.; Easterwood,* 507 U.S. at 662; H. Rep. No. 91-1194, at 19 (emphasizing congressional intent to forbid any "[s]tatewide standards superimposed on national standards covering the same subject matter"), *reprinted in* 1970 U.S.C.C.A.N. at 4117.

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[5] The FRSA was originally codified at 45 U.S.C. §§ 421 to 444. As part of a broad reorganization of federal transportation laws, Congress formally repealed the FRSA in 1994 and re-enacted its substantive provisions for codification in Title 49. *See* Act of July 5, 1994, Pub. L. No. 103-272, 108 Stat. 745. Congress made clear that the repeal and re-enactment were not intended to make any substantive change in the FRSA provisions, other than minor alterations in form or language. *See id.* § 6(a), 108 Stat. at 1378; H.R. Rep. No. 103-180, at 1-5 (1993), *reprinted in* 1994 U.S.C CA.N. 818, 818-22. Even though the events in question in this case took place before the 1994 recodification, this brief will use the current Title 49 citations for the FRSA provisions.

4. The 1972 Report Of The Secretary On Railroad Crossings.

In the FRSA and the Highway Safety Act of 1970, Congress expressed special concern about railway crossing safety, and it mandated that the Secretary undertake a coordinated effort toward the objective of developing and implementing solutions to the grade crossing problem, and to transmit to Congress a comprehensive report on the problem together with his recommendations for appropriate action. See FRSA, § 204, 84 Stat. at 972; Highway Safety Act of 1970, Pub. L. No. 91-605, § 205(a), 84 Stat. 1739, 1742; H.R. Rep. 91-1194, at 18-19, *reprinted in* 1970 U.S.C.C.A.N. at 4116. *Easterwood*, 507 U.S. at 661-62. Pursuant to the Congressional mandate, the Secretary filed a two-part Report. The first part was the Secretary's study of the problem, and the second contained his analysis and recommendations for solution. First, noting that problems of fragmented jurisdiction among state and local authorities and the railroads had hampered making an effective attack on crossing hazards, the Secretary emphasized "[t]he need for national coordination of an issue that affects the Nation's railroad and highway systems." *1972 Crossings Report (Part II)* at iii. The Secretary recommended that states retain their existing authority to select crossing improvements, subject to FHWA oversight, but they "should be strongly encouraged to develop procedures to assure that every crossing in the State will be given equal consideration for improvement under any grade crossing improvement program." *Id.* at iv. Second, the Secretary recommended a dramatic and refocused expansion of federal funding, driven by cost-benefits analyses to maximize accident reduction. *Id.* at ii. Applying that approach, the Secretary favored upgrades of warning devices over the more expensive alternative of eliminating grade crossings. *Id.* The Secretary

further determined that active warning devices (such as flashers or gates) would be justified at only 30,000 of the nation's then-existing 223,000 public grade crossings. *Id.* at ii, 86-88. Underscoring the benefits to be derived from deployment of passive warning devices, the Secretary urged that states and railroads institute a program for such improvements "[t]o effectively treat . . . lower volume crossings which do not warrant active protection and to provide effective advance warning at all crossings." *Id.* at ii, 92. Finally, observing that crossing dangers were not limited to the traditional Federal-aid highway system, the Secretary called for expansion of federal funding to all public roads in a State. *Id.* at iii, 14, 92.

5. *The Highway Safety Act Of 1973 And Subsequent Legislation.*

Congress responded to the Secretary's Report by enacting section 203 of the Highway Safety Act of 1973, Pub. L. No. 93-87, 87 Stat. 282, 283, the provisions of which were later incorporated (as revised) in 23 U.S.C. § 130.[6] See *Easterwood*, 507 U.S. at 662-63. The statute specifically authorizes the grant of federal funds to States "for the elimination of hazards of railway-highway crossings." 23 U.S.C. § 130(a).[7] To secure funds, States "must survey all highways" to identify crossings in need of safety improvements (including "protective devices"), and must "establish and implement a schedule of projects for this purpose." *Id.* § 130(d). As this Court stated in *Easterwood*, section 130 and the FHWA's later implementing regulations constitute a "federal effort to encourage the States to rationalize their decisionmaking" on elimination of crossing hazards. 507 U.S. at 667.

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[6] Congress repealed section 203 of the 1973 Highway Safety Act and re-enacted its provisions (with minor substantive changes not relevant here) as amendments to 23 U.S.C. § 130 in section 121 of the Surface Transportation Act of 1987, Pub. L. No. 100-17, § 121, 101 Stat. 132, 159-60. *See* Federal Highway Administration, U.S. Dep't of Transportation, *The 1996 Annual Report on Highway Safety Improvement Programs* I-2 (1996) (*"1996 Annual Report"*).

[7] Although otherwise available funding could also be used to implement the section 130 program, the 1973 Act created a special authorization from the Highway Trust Fund for projects to redress crossing hazards on the federal-aid highway system. Pub. L. No. 93-87, § 203(b), (c), 87 Stat. 282, 283. In 1976, after an inventory of the nation's crossings revealed that 77% of the nation's public crossings were off the federal-aid system, *1989 Crossings Study* at I-9, Congress specifically authorized a separate section 203(c) Rail-Highway Crossings Off-System Program to extend federal funding "for the elimination of hazards of railway-highway crossings on roads other than those on any Federal-aid system." Federal-Aid Highway Act of 1976, Pub. L. No. 94-280, § 203(c), 90 Stat. 425, 452. In creating the new Off-System Program, Congress specifically provided that funding for projects under that program "shall be subject to all of the provisions of chapter 1 of title 23, United States Code, applicable to highways on the Federal-aid system." *Id.* Thus, for all crossing projects, the Secretary of Transportation had to ensure that the plans and specifications provided for the design and construction of facilities according to standards best suited to ensure adequate safety, 23 U.S.C. § 109(a), that all federally funded warning signs and traffic signals would "promote the safe and efficient utilization of the highways," *id.* § 109(d), and, more specifically, that all "safety protective devices" at grade crossings complied with the Secretary's adequacy standards, *id.* § 109(e).

In 1978, Congress was concerned that "about one-half of the 170,000 grade crossings off the Federal aid-system ha[d] inadequate warning devices" and sought to "bring warning devices at off-system crossings up to acceptable levels." H.R. Rep. No. 95-1485, at 44 (1978), *reprinted in* 1978 U.S.C.C.A.N. 6575, 6620. It accordingly consolidated the On-System and Off-System programs into a single program, repealing § 203(c). Highway Safety Act of 1978, Pub. L. No. 95-599, § 203, 92 Stat. 2727, 2728; H.R. Conf. Rep. No. 95-1797, at 117 (1978), *reprinted in* 1978 U.S.C.C.A.N. 6693, 6731. This gave the States and the FHWA the necessary flexibility to apply the full amount of federal crossing funds as public need dictated, without regard to the location of the crossing. The FHWA continues to operate a single Railway Crossings Program. *See* 23 U.S.C. § 133(d)(1); *1996 Annual Report* at I-1 to I-2.

In keeping with the recommendations in the 1972 Report, Congress further required that "[a]t a minimum, such a schedule shall provide for signs for all railway-highway crossings," 23 U.S.C. § 130(d), and that "[a]t least ½ of the funds authorized for and expended under this section shall be available for the installation of protective devices at railway-highway crossings," rather than for crossing separations or relocations, *id.* § 130(e). Recognizing that railroads do not usually gain economically from the installation of protective devices, because the cost of installation and maintenance exceeds the expected cost of tort liability at any particular crossing, see *1972 Crossings Report (Part II)* at 104-05, Congress forbade railroads to be charged for crossing hazard projects unless the Secretary of Transportation determined that the project resulted in a net benefit for the railroad, and, in any event, capped any such charge at 10% of project costs. 23 U.S.C. § 130(b). The Secretary has confirmed that crossing improvements are of no ascertainable benefit to railroads, and has forbidden States to force railroads to contribute to the cost of improvement projects. 23 C.F.R. § 646.210(a), (b)(1).

Finally, in section 130, Congress mandated close federal oversight of the States' crossing programs. Under subsection (g),

> [e]ach State shall report to the Secretary not later than December 30 of each year on the progress being made to implement the railway-highway crossings program authorized by this section and the effectiveness of such improvements. Each State report shall contain an assessment of the costs of various treatments employed and subsequent accident experience.

23 U.S.C. § 130(g). Congress also imposed a requirement on the Secretary in turn to file an annual report

with the relevant House and Senate Committees "on the progress being made by the State[s] in implementing projects to improve railway-highway crossings." *Id.* Congress mandated that in such reports the Secretary "shall analyze and evaluate each State program [and] identify any State found not to be in compliance with the schedule of improvements required by subsection (d)." *Id.* Thus, the statutory regime requires intimate involvement of the FHWA in the development and revision of State grade-crossing programs to ensure the elimination of crossing hazards.

In enacting the Section 130 crossing program, Congress thus embraced a system in which the selection of warning devices at crossings would be based on expert, technical determinations and extensive data analyses, in contrast to the vagaries of a retrospective tort law system which promotes remediation in response to accidents that occur, whether or not they are reflective of actual future risk. Importantly, to ensure that expert crossing evaluations are not impeded by concerns over future litigation, Congress has acted to prohibit the discovery or admission as evidence in any federal or state court proceeding of

> reports, surveys, schedules, lists, or data compiled or collected for the purpose of identifying, evaluating, or planning the safety enhancement of potential accident sites, hazardous roadway conditions, or railway-highway crossings, pursuant to sections 130, 144, and 152 of this title or for the purpose of developing any highway safety construction improvement project which may be implemented utilizing Federal-aid highway funds.

23 U.S.C. § 409.

6. *FHWA's Regulatory Implementation Of The Section 130 Program.*

Soon after its passage, the FHWA promulgated regulations to implement the 1973 Act.[8] One set of regulations, now codified at 23 C.F.R. pt. 924, governs state highway safety improvement programs (under which States conduct analyses and remediation of railway crossing hazards under 23 U.S.C. § 130). The regulations mandate that "[t]he highway safety improvement program in each State shall consist of components for planning, implementation, and evaluation of safety programs and projects," and that "[t]hese components shall be comprised of processes developed by the States and approved by the Federal Highway Administration." 23 C.F.R. § 924.7. The FHWA has set forth comprehensive specifications for States to develop processes for collecting and maintaining accident, highway, and railway data, *id.* § 924.9(a)(1); for data analysis and engineering studies of crossings, *id.* § 924.9(a)(2)-(3); and for prioritizing, scheduling, and evaluating crossing improvement projects, *id.* §§ 924.9 (a)(4), 924.11, 924.13.

In addition to the general regulations governing state crossing programs, the FHWA made States "subject to further regulations governing the use of particular warning devices." *Easterwood*, 507 U.S. at 666-67. Those regulations, which are directly at issue in this case, are set forth in 23 C.F.R. § 646.214(b), which was promulgated in 1975.[9]

Regulation 646.214(b) has three subsections. Subsection (b)(1) provides that the States "*must employ* devices that conform to standards set out in FHWA's Manual on Uniform Traffic Control Devices for Streets and Highways (MUTCD or Manual)." *Easterwood*, 507 U.S. at 667 (emphasis added); 23 C.F.R. § 646.214(b)(1). Although it imposes certain requirements if special conditions are present, the MUTCD imposes only one mandatory requirement for all grade crossings: namely, that on each roadway approach to the crossing, there must be one "crossbuck sign" (*i.e.*, the traditional X-shaped sign with the words RAILROAD CROSSING on crossed panels) placed on the right-hand side, if feasible. Federal Highway Administration, U.S. Dep't of Transportation, *Manual on Uniform Traffic Control Devices for Streets and Highways* 8B-1 (1988) (*"MUTCD"*).

[8] The Secretary delegated his statutory power under the relevant Acts to the FHWA. *See* 49 C.F.R. § 1.48(b), (c)(2).

[9] *See* Reimbursement for Railroad Work and Railroad-Highway Projects, 40 Fed. Reg. 16,057, 16,061 (Apr. 9, 1975).

Subsections (b)(2) through (b)(4) cover the subject matter of the adequacy of warning devices at railway crossings in federally funded projects. See *Easterwood*, 507 U.S. at 666, 670-71. Subsection (b)(2) restates the requirements of 23 U.S.C. § 109(e) that, where railway crossings are within or near the terminus of a federal-aid highway project, the crossing shall not be opened for unrestricted use nor the project accepted by FHWA "until adequate warning devices for the crossing are installed and functioning properly." 23 C.F.R. § 646.214(b)(2). Subsections (b)(3) and (b)(4) set forth the rules for determining the adequacy of crossing devices, not only for crossings governed by (b)(2), but for "any project where Federal-aid funds participate in the installation of the devices." *Id.* § 646.214(b)(3)(i).

For high-risk crossings enumerated in subsection (b)(3) —such as crossings with multiple tracks, high speed trains operating in areas of limited visibility, or heavy vehicle or train traffic—the FHWA prescribes that only devices that include "automatic gates with flashing light signals" will

be adequate, unless the FHWA finds otherwise based on diagnostic team recommendations. *Id.* § 646.214(b)(3)(i), (ii). For all other crossings, subsection (b)(4) prescribes that the "type of warning device to be installed . . . is subject to the approval of FHWA." *Id.* § 646.214(b)(4). See *Easterwood*, 507 U.S. at 666-67.

To facilitate its program oversight, FHWA has developed procedures for approval of federal-aid projects (such as the federally funded installation of warning devices), which are set forth in 23 C.F.R. pt. 630. Cf. 23 C.F.R. § 646.216(a) (general procedures for federal-aid projects apply to railway crossing projects "[u]nless specifically modified herein"). Those regulations prescribe that "[a]uthorization can be given only after applicable prerequisite requirements of Federal laws, and implementing regulations and directives have been satisfied." *Id.* § 630.106(a). Among the legal requirements that must be satisfied are "standards as prescribed by 23 U.S.C. 109." *Id.* § 630.114(b) (1988).[10] For every project, the State must submit "plans, specifications, and estimates (PS&E), and supporting documents," *id.* § 630.201, the contents of which are determined by the FHWA, *id.* § 630.205(a). Those plans and specifications must "describe the location and design features and construction requirements in sufficient detail" for FHWA evaluation. *Id.* § 630.205(b). They are submitted to the FHWA "for approval," *id.* § 630.205(c), and the project shall not be advertised for bid or commenced until the plans "ha[ve] been approved

[10] The regulation here cited, which was in effect at the time of project approval, has now been recodified as 23 C.F.R. § 630.106(a). The reference to section 109 as one of the legal standards to be satisfied was omitted from the new regulation as part of an FHWA effort to reduce verbiage, but the FHWA has made clear that no substantive change was intended. *See* Federal Aid-Project Authorization, 61 Fed. Reg. 35,629, 35,630 (July 8, 1996).

by the FHWA and the [State] has been so notified." *Id.* § 630.205(e). When a project is approved, the State and the FHWA enter into a federal-aid project agreement, which recites that the "State, through its Highway Agency, ha[s] complied, or [is] hereby agreeing to comply, with the applicable terms and conditions set forth in (1) Title 23, U.S. Code, Highways, (2) the Regulations issued pursuant thereto and, (3) the policies and procedures promulgated by the Federal Highway Administrator relative to the above designated project." J.A. 128; 23 C.F.R. § 630.307(a). The standard project agreement further provides that "[t]he State highway agency will not install, or permit to be installed, any signs, signals, or markings not in conformance with the standards approved by the Federal Highway Administrator pursuant to 23 U.S.C. 109(d) or the State's Certificate as applicable." J.A. 130, § 11.

B. Federal And State Implementation Of The Section 130 Program.

The Department of Transportation, the States, and the railroads quickly set about realizing Congress's vision of a continuous, systematic, and technically driven approach to eliminating railway crossing hazards. Those entities cooperated to develop the United States DOT/AAR[11] National Rail-Highway Crossing Inventory (maintained by the Federal Railroad Administration ("FRA")), in which every single railroad crossing was surveyed and relevant operating, physical, and traffic data were re-

[11] AAR stands for the Association of American Railroads, the rail industry's major trade association. AAR's members include the National Railroad Passenger Corporation (Amtrak) and freight railroads that operate 75 percent of the line haul mileage, employ 91 percent of the workers, and account for 93 percent of the freight revenues of all railroads in the United States. *See* Brief of AAR as *Amicus Curiae*.

corded. *Crossing Handbook* at 52-53; U.S. Dep't of Transportation, Update Manual, *National Railroad-Highway Crossing Inventory* B-1 (1976). The Department of Transportation has defined procedures and allocated specific responsibilities to States and the railroads to ensure continuous updating of crossing information. Railroads, for example, are responsible for providing information on the numbers of track, types of warning devices, crossing surface, daily train movements, and train speeds. *Id.* at C-3. State highway agencies are responsible for providing such information as the character of surrounding developments (residential, industrial, commercial), road characteristics, crossing angles, and vehicular and truck traffic counts. *Id.* Systematic updating of the crossing inventory satisfies the State's obligation under section 130 to conduct annual crossing surveys. *Id.* at A-1.

The Department of Transportation also required the States to develop systematic methods for identifying and ranking crossings for accident potential. *Crossing Handbook* at 63. Those hazard rankings are generated by applying sophisticated computer analysis of the various hazard prediction formulae that the States may select to the inventory and accident data that have been gathered. *Id.* at 63-79. The highest-ranking crossings are then selected to be analyzed in the field by diagnostic teams who conduct engineering studies of "the site characteristics, the existing traffic control system, and the highway and railroad operational characteristics." *Id.* at 79. In its supervisory capacity over Section 130 programs, the FHWA has provided extensive guidance to the States on the conduct of engineering studies and the identification of remediation measures. See *id.* at 79-203.

This technically driven approach to crossing hazards, which requires expert engineering determinations of cost-effective safety measures based on continuously updated data and scientific formulae for predicting accidents, has

been a resounding success. Federal funds have accounted for most of the $3 billion expended on grade crossing safety involving nearly 30,000 projects between 1974 and 1995. Federal Highway Administration, U.S. Dep't of Transportation, *Accidents That Shouldn't Happen: A Report of the Grade Crossing Safety Task Force to Secretary Frederico Pena* 3 (Mar. 1, 1996) <http://www.fhwa.dot.gov/omc/contents.htm> ("*1996 Task Force Report*"). Despite increased highway and rail traffic, the Section 130 program has contributed to a precipitous decline in the number of crossing accidents and fatalities: there were more than 12,000 accidents and 1,500 fatalities at railway crossings in 1972, but only 3,508 accidents and 431 fatalities in 1998. *Id.* at 2; Federal Railroad Administration, U.S. Dep't of Transportation, *Railroad Safety Statistics Annual Report 1998* 7-7 (1999) (Table 7-2) ("*1998 Safety Report*"). The FHWA has "estimated that since its inception, the Section 130 Program has helped save almost 9,000 lives and prevent nearly 40,000 injuries." *1996 Task Force Report* at 3.

C. The Tennessee Crossing Program Under The Highway Safety Act.

The Tennessee Department of Transportation ("TDOT") instituted a crossing program under 23 U.S.C. § 130(d) to survey the more than 3,400 public grade crossings in the State and, using sophisticated computer modeling that evaluates data at every crossing, to rank those crossings in terms of relative hazard. J.A. 99-100. A diagnostic team of highway engineers is assembled to go to priority crossings and evaluate what warning devices (active or passive) are appropriate. *Id.* at 100-01.

Tennessee has also implemented what it has designated as its "minimum protection program," J.A. 102, even though it goes well beyond the federal MUTCD minimum

of two crossbucks, one on each approach to a crossing. Cf. *MUTCD* at 8B-1. Tennessee has mandated there will be "two reflectorized crossbucks, two advanced warning signs and two advanced pavement markings at each crossing, if the road would take it." J.A. 102-03.[12]

In 1987, TDOT surveyed 196 crossings in West Tennessee as part of this program, and sought federal funding to install any devices necessary to bring those crossings into compliance with the aforementioned state standard. On April 2, 1987, the FHWA Division Administrator for Tennessee authorized the project to proceed, and on June 2 of that year TDOT entered into a project agreement with the FHWA to spend $128,848 of federal funds on those crossings (which represented 99% of the project cost). J.A. 128.

One such crossing was the Oakwood Church Road crossing in rural Gibson County, where TDOT's contractor removed existing crossbucks and installed reflectorized crossbucks and three advanced warning signs on the approach roads. J.A. 103-04, 128. The placement of the three signs and crossbucks at the Oakwood Church Road crossing shows that, despite the numerous crossings in the federally funded project, due attention was given by the governmental authorities to the upgrade needs of each individual crossing.[13] An FHWA engineer inspected

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12 The Tennessee minimum protection program in effect uses the full panoply of passive warning devices, other than those that are used or permitted only in the presence of special conditions. *See 1989 Crossings Study* at 4-2 to 4-4.

13 By operation of 23 U.S.C. § 409, there is no discoverable or admissible evidence of what data or documentation was submitted in support of TDOT's 1987 application for federal funds. Furthermore, although it is possible to identify Oakwood Church Road as one of the crossings at which warning devices were installed in this project, section 409 bars discovery of its rank in the Tennessee

the project by visiting a sample of the crossings over a two-day period in November 1987,[14] and certified the project's completion. *Id.* at 139, 132. On December 11, 1989, the FHWA paid its 99% share of the project cost to TDOT. *Id.* at 133. Thus, federal funds paid for the installation of warning devices at the Oakwood Church Road crossing in Gibson County, Tennessee.

D. This Litigation.

On October 3, 1993, Eddie Shanklin was killed in a train collision at the Oakwood Church Road crossing as he was driving to work from his home nearby. Respondent Dedra Shanklin, his widow, brought a wrongful death action under Tennessee statutory and common law against petitioner. She alleged various bases of tort liability, including that petitioner was negligent in failing to install adequate warning devices at the crossing. See Pet. App. 2a.

A principal issue both at trial and on appeal was whether, under this Court's decision in *Easterwood*, the FRSA preempted respondent's inadequate-device state tort law claim. In *Easterwood*, this Court declared that the federal regulations defining "adequate warning devices" in 23 C.F.R. § 646.214(b)(3) and (4) do "cover[] the subject matter of," 49 U.S.C. § 20106, state tort law requiring due care in the selection of warning devices. 507 U.S. at 670.[15] Those regulations, this Court held,

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crossing-hazard index, or of any possible analysis of the crossing by a TDOT diagnostic team. *See* J.A. 101-02 (refusal of TDOT official to divulge that information).

14 There is no record of whether the installations at the Oakwood Church Road crossing were inspected. J.A. 126. The TDOT employee who accompanied the FHWA official could not recall inspecting that crossing. *Id.* at 115.

15 FRSA preemption applies to any rule, regulation, or standard issued by the Secretary of Transportation that relates to railroad

"displace state and private decisionmaking authority by establishing a federal-law requirement that certain protective devices be installed or federal approval obtained." *Id.* Thus, inadequate-device tort claims against railroads under state law are preempted whenever "federal funds participate in the installation of warning devices," because in that situation the federal-law requirements imposed in 646.214(b) are applicable. *Id.* at 671.

Even though the Oakwood Church Road crossing's warning devices were federally funded, the district court denied petitioner's preemption defense on summary judgment. Pet. App. 26a. Moreover, the district court instructed the jury that petitioner's duty to exercise reasonable care in warning motorists of an oncoming train "may encompass providing additional warning devices if the crossing is more than ordinarily hazardous." J.A. 55. The jury found negligence on the part of both petitioner and the deceased, and assessed damages at $615,379. Because the jury assigned 70% of the negligence to petitioner, judgment was entered against petitioner for $430,765.30.

On appeal, the Sixth Circuit affirmed. It explicitly rejected the rule that "federal funding is both a necessary and a sufficient condition for the preemption of state law" under *Easterwood*. Pet. App. 9a. Instead, it adopted a two-part test for *Easterwood* preemption: (1) whether federal funds participated in the installation of the devices in question, and (2) whether FHWA "actually determined that active warnings were needed pursuant to (b)(3) or that only passive warnings were needed pursuant to

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safety, and not just those issued under the authority of the FRSA. *CSX Transp., Inc.* v. *Easterwood*, 507 U.S. 658, 663 n.4 (1993). As this Court noted in *Easterwood*, however, 23 C.F.R. § 646.214 (b)(3) and (4) were promulgated in part under the FRSA. *Id.*

(b)(4)." *Id.* at 13a (citing *Shots* v. *CSX Transp., Inc.*, 38 F.3d 304, 307-09 (7th Cir. 1994)).

The Sixth Circuit further rejected the argument that approval of federal funding should be the touchstone of preemption, even though by statute and regulation no funds can be approved unless safety devices comply with FHWA standards, 23 U.S.C. § 109; 23 C.F.R. § 630.106(a); the court reasoned that those provisions do no more than restate the requirements of 23 C.F.R. § 646.214(b)(3) and (4). Pet. App. 19a. Finally, it dismissed the argument that the statutory prohibition on discovery of "reports, surveys, schedules, lists, or data" regarding crossing safety enhancements, 23 U.S.C. § 409, prevented railroads from raising preemption defenses under its approach.

SUMMARY OF ARGUMENT

This Court's unanimous decision in *CSX Transportation, Inc.* v. *Easterwood*, 507 U.S. 658 (1993), controls this case. In *Easterwood*, this Court held that the FHWA regulation prescribing federal-law requirements for the selection of adequate warning devices at railway crossings covers the subject matter of (and therefore preempts) state common-law duties of a railroad to provide such devices. Because it is the regulation that has preemptive force under the FRSA, this Court held that preemption occurs whenever the regulation is applicable. The FHWA warning-device regulation is applicable whenever federal funds participate in the installation of the devices, and thus under *Easterwood* any state-law claim that a federally funded device is inadequate is preempted.

The Sixth Circuit's decision conflicts with *Easterwood* because it imposes an additional, unjustified prerequisite to preemption: not only must the FHWA regulation be applicable, but the railroad must also submit additional

evidence that the FHWA actually determined the conditions that exist at a particular crossing and whether active or passive devices are adequate for that crossing. Besides its patent conflict with *Easterwood*, the Sixth Circuit's approach is irreconcilable with both FRSA and the FHWA regulation. Even though preemption under FRSA is a straightforward matter of whether the regulation covers the subject matter of state law, the Sixth Circuit has devised a strange and unworkable rule in which preemption does not depend on the coverage of the regulation itself, but on the actions that a local FHWA official takes pursuant to that regulation. Furthermore, the Sixth Circuit wholly misreads the regulation to impose on the FHWA the obligation to make independent assessments of what warning devices are proper for each specific crossing in a project, even though state officials are already required to have made that determination. The text, structure, and history of the FHWA regulation in question make clear that no such duplicative federal determinations are required, and the FHWA may rely on the state highway agency's determinations in ensuring that adequate devices are installed in compliance with federal law. Preemption arises from the regulatory imposition of federal-law rules that require automatic gates at certain high-risk crossings and reserve final authority over device selection to the FHWA; it has nothing to do with the determinations actually made by the FHWA official with responsibility for a project.

Finally, the Sixth Circuit's rule effectively nullifies *Easterwood* preemption because it would be impossible for a railroad to prove such a defense. The evidence of independent FHWA analysis of crossing conditions and warning devices that the Sixth Circuit held to be the *sine qua non* of preemption does not as a general rule exist, and in any event would be barred from discovery or

admission in a court proceeding by operation of federal law designed to protect the integrity of the federal-state crossing program. The Sixth Circuit departed from *Easterwood* based on fundamental misconceptions of this Court's decision and of the statutory and regulatory regime, and its decision should be reversed.

ARGUMENT

I. *EASTERWOOD* MAKES CLEAR THAT INADEQUATE-DEVICE CLAIMS UNDER STATE LAW ARE PREEMPTED WHENEVER THE FEDERAL WARNING-DEVICE REGULATION IS APPLICABLE.

This Court's decision in *CSX Transportation, Inc.* v. *Easterwood*, 507 U.S. 658 (1993), clearly disposes of this case in petitioner's favor. In *Easterwood*, this Court decided that, whenever federal funds participate in the installation of warning devices at railway crossings, the FHWA regulation on adequacy of the devices governs, and state tort law imposing an independent duty on a railroad to provide adequate warning devices at railway crossings is preempted under the FRSA. *Id.* at 670-71.

The operative statutory provision in *Easterwood* (as here) is the preemption provision of the FRSA. That statute provides that "[l]aws, regulations, and orders related to railroad safety shall be nationally uniform to the extent practicable," and only permits States to "adopt or continue in force a law, regulation, or order related to railroad safety until the Secretary of Transportation prescribes a regulation or issues an order covering the subject matter of the State requirement." 49 U.S.C. § 20106. Thus, under the FRSA, preemption flows from the regulation prescribed by the Secretary of Transportation (or his delegatee, such as the FHWA); if the regulation "covering the subject matter of the State requirement" is

applicable, then the state law duty is preempted. See *Easterwood*, 507 U.S. at 665 (FRSA preemption "depends on whether the regulations . . . cover the subject matter of the [state law] allegations").

In *Easterwood*, the railroad petitioner argued that multiple regulations and orders of the Secretary—including not only 23 C.F.R. § 646.214(b) but also the MUTCD and the general federal regulations governing the States' highway safety improvement programs in 23 C.F.R. pt. 924—"cover[ed] the subject matter of" and thus preempted state tort claims of negligence in the selection of warning devices at grade crossings. This Court held that "[l]egal duties imposed on railroads by the common law" were encompassed by the FRSA provision preempting state law requirements related to railroad safety. *Easterwood*, 507 U.S. at 664 (citing *Cipollone* v. *Liggett Group, Inc.*, 505 U.S. 504, 522 (1992)). However, the Court gave the statutory preemption clause of the FRSA a "restrictive" reading, *id.*, and refused to accord preemptive effect to the MUTCD or the general Part 924 program regulations. *Id.* at 667-70.

Notwithstanding its restrictive reading of the statute, this Court determined that under FRSA "the provisions of 23 C.F.R. §§ 646.214(b)(3) and (4)" did preempt state common law claims against railroads that warning devices at crossings were inadequate. *Id.* at 670. Subsections (b)(3) and (b)(4) were different from the MUTCD or the program regulations, this Court reasoned, because they "establish requirements as to the installation of particular warning devices." *Id.* Thus, this Court held, "[e]xamination of these regulations demonstrates that, *when they are applicable*, state tort law is pre-empted." *Id.* (emphasis added).

State common law traditionally placed a duty upon railroads to exercise due care in deciding what warning

devices to install at highway crossings. See, *e.g.*, *Grand Trunk Ry. Co.* v. *Ives*, 144 U.S. 408, 416-20 (1892). Subsections (b)(3) and (b)(4), the *Easterwood* Court held, "displace state and private decisionmaking authority by establishing a federal-law requirement that certain protective devices be installed or federal approval obtained," and "set the terms under which railroads are to participate in the improvement of [their] crossings." 507 U.S. at 670. Subsection (b)(3), by making automatic gates with flashing light signals mandatory at enumerated high-risk crossings, except when the FHWA accepts a diagnostic team's contrary recommendation, see 23 C.F.R. § 646.214(b)(3)(i) and (ii), is a federal law requirement that restricts the railroad's role in device selection at those crossings to "participation in diagnostic teams which may recommend the use or nonuse of crossing gates." *Easterwood*, 507 U.S. at 671.[16]

> Likewise, § 646.214(b)(4), which covers federally funded installations at crossings that do not feature multiple tracks, heavy traffic, or the like, explicitly notes that railroad participation in the initial determination of "the type of warning device to be installed" at particular crossings is subject to the Secretary's approval.

Id. Furthermore, this Court declared, in all federally funded projects, FHWA regulations alter state and railroad decisionmaking in device selection by prescribing that railroads may not be made to pay installation costs. *Id.* (citing 23 C.F.R. § 646.210(b)(1)). Thus, where they apply, the FHWA warning-device regulations impose

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16 Some States, like Tennessee, do not even allow railroad personnel on their diagnostic teams. *Cf. MUTCD* at 8D-1 ("The selection of traffic control devices at a grade crossing is determined by public agencies having jurisdictional responsibility at specific locations").

requirements in a selection process and thereby supersede state tort law duties of care.

The regulations of (b)(3) and (b)(4) apply in "*any project* where Federal aid-funds participate in the installation of the devices." 23 C.F.R. § 646.214(b)(3)(i) (emphasis added). Accordingly, this Court held,

> *for projects in which federal funds participate in the installation of warning devices,* the Secretary has determined the devices to be installed and the means by which railroads are to participate in their selection. The Secretary's regulations therefore cover the subject matter of state law which, like the tort law on which respondent relies, seeks to impose an independent duty on a railroad to identify and/or repair dangerous crossings.

Easterwood, 507 U.S. at 671 (emphasis added).

It is notable that, in reaching this holding, the Court followed not only the plain meaning of FRSA and the regulations, but also the interpretation of them advanced by the Solicitor General of the United States and the Department of Transportation. The unqualified position of the United States was that "the Secretary has preempted States from imposing . . . duties" of care under state law "with respect to grade crossings where the safety devices have been installed with the use of federal funds." Brief for the United States as *Amicus Curiae* at 10, *CSX Transp., Inc.* v. *Easterwood*, 507 U.S. 658 (1993) (Nos. 91-790, 91-1206) (Aug. 27, 1992) ("*U.S. Easterwood Br.*"); see also *id.* at 17 ("Federal law has not preempted all state law duties on railroads to maintain safe grade crossings, but has preempted such duties at grade crossings improved using federal funds") (boldface capitalization omitted); *id.* at 18 (With regard to "common law duties to participate in the process of providing safe grade crossings to

the public," "Section 434 of FRSA [now codified at 49 U.S.C. § 20106] compels the conclusion that federal regulations supplant that duty . . . in the circumstances addressed in federal regulations, 23 C.F.R. 646.214(b), covering the selection of warning devices where those devices are installed with federal funds."); *id.* at 24 ("The scope of 23 C.F.R. 646.214(b) indicates that *for federally funded projects* the Secretary has covered the subject matter of what safety devices are appropriate.") The Solicitor General's reasoning paralleled the Court's in *Easterwood*:

> One regulation, 23 C.F.R. 646.214(b), specifically mandates . . . the safety devices necessary for adequate warnings at crossings improved with the use of federal funds. That regulation lists particular circumstances in which gate arms are required, and mandates that the warning devices at crossings not requiring gate arms are subject to FHWA approval. In view of its comprehensive scope, we believe that 23 C.F.R. 646.214(b) covers the subject matter of adequate warning devices at federally funded grade crossings, and therefore preempts States from requiring more or different devices at such locations.

Id. at 12.

The majority of federal courts of appeals and state supreme courts have understood the clear holding of *Easterwood*: inadequate device claims are preempted whenever "federal funds participate in the installation of warning devices." *Easterwood*, 507 U.S. at 671. In fidelity to *Easterwood*, these courts have rightly concluded that "[f]ederal funding is the touchstone of preemption in this area," *Bock* v. *St. Louis Southwestern Ry. Co.*, 181 F.3d 920, 922 (8th Cir. 1999) (internal quotation marks omitted), *petition for cert. filed*, 68 USLW 3234 (U.S. Sept. 27, 1999) (No. 99-538), because federal funding triggers

the application of 646.214(b)'s federal-law requirements for the selection of warning devices at railway crossings. See *Armijo* v. *Atchison, Topeka & Santa Fe Ry. Co.*, 87 F.3d 1188, 1190 (10th Cir. 1996); *Hester* v. *CSX Transp., Inc.*, 61 F.3d 382, 386 (5th Cir. 1995); *Ingram* v. *CSX Transp., Inc.*, 146 F.3d 858, 865 (11th Cir. 1998); *Lubben* v. *Chicago Cent. & Pac. R.R. Co.*, 563 N.W.2d 596, 600 (Iowa 1997); *Union Pac. R.R. Co.* v. *Sharp*, 952 S.W.2d 658, 667 (Ark. 1997).

In *Easterwood*, this Court, after establishing the pre-emptive force of 23 C.F.R. § 646.214, found the regulation to be inapplicable because the "facts [did] not establish that federal funds participated in the installation of the warning devices" at the crossing in question. 507 U.S. at 672 (internal quotation marks and original brackets omitted). Federal funds had only been used to pay for motion-detection circuitry, but such circuitry did not fit the regulatory definition of warning devices. *Id.* at 672 & n.11. Because federal funds had not been used to install warning devices, the federal regulation was inapplicable, and Ms. Easterwood's grade-crossing claim was not pre-empted. *Id.* at 673. Here, there is no dispute that the crossbucks and advanced warning sign installed at Oakwood Church Road in 1987 are passive warning devices within the meaning of FHWA regulations.[17] Nor is it disputed that "Federal aid-funds participate[d] in the installation of the devices," 23 C.F.R. § 646.214(b)(3)(i), for indeed federal funds covered 99% of the costs of the project. J.A. 133. Because the regulation is applicable, respondent's grade crossing claim is preempted under the FRSA. *Easterwood*, 507 U.S. at 670.

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17 "*Passive warning devices* means those types of traffic control devices, including signs, markings and other devices, located at or in advance of grade crossings to indicate the presence of a crossing but which do not change aspect upon the approach or presence of a train." 23 C.F.R. § 646.204.

II. THE DECISION BELOW IS PREDICATED ON MISREADINGS OF *EASTERWOOD*, THE FEDERAL RAILROAD SAFETY ACT, AND THE FEDERAL WARNING-DEVICE REGULATION.

Despite the clarity of *Easterwood*, the Sixth Circuit refused to give this Court's opinion a "literal reading." Pet. App. 11a-12a (quoting *Shots* v. *CSX Transp., Inc.*, 38 F.3d 304, 307 (7th Cir. 1994)). Disregarding this Court's holding that when 23 C.F.R. § 646.214(b)(3) and (4) "*are applicable*, state tort law is pre-empted," *CSX Transp., Inc.* v. *Easterwood*, 507 U.S. 658, 670 (1993) (emphasis added), the Sixth Circuit imposed a second requirement that effectively negates the rule established by this Court. Under the Sixth Circuit's two-part test, "a court must first establish that (b)(3) and (b)(4) are applicable, *and then* establish that either (b)(3) or (b)(4) was, in fact, applied." Pet. App. 13a (emphasis added). To meet the second prong of this test, the Sixth Circuit required evidence (beyond the Secretary's approval of federal funds for the installation of warning devices) that "the Secretary or one of his agents actually determined that active warnings were needed pursuant to (b)(3) or that only passive warnings were needed pursuant to (b)(4)." *Id.*

Beyond being flatly in conflict with *Easterwood*, the Sixth Circuit's test is irreconcilable both with the FRSA and the federal warning-device regulation. The court of appeals failed to consider that the source of preemption under the FRSA is the "regulation . . . covering the subject matter of the State requirement." 49 U.S.C. § 20106. Because preemption flows from the requirements of the federal regulation itself, this Court held in *Easterwood* that if the warning-device regulation of 23 C.F.R. § 646.214(b) is applicable—*i.e.*, "[f]ederal aid-funds participate in the installation of the devices," 23 C.F.R. § 646.214(b)(3)(i)—state law claims challenging the

adequacy of the devices are preempted. Preemption does not depend on how the regulation may be implemented by a federal employee in one of the local FHWA divisions that has oversight responsibility for a particular state crossing project.

In addition, the Sixth Circuit thoroughly misapprehended the federal warning-device regulation and the actions it requires of FHWA officials. It disregarded the language of 23 C.F.R. § 646.214(b) and its origins. Moreover, the court's interpretation of the regulation as requiring the FHWA to make an independent evaluation of whether passive or active devices were appropriate for a specific crossing, Pet. App. 13a, is made up out of whole cloth.

The language of the regulation certainly does not require any crossing-specific determinations by the FHWA. Section (b)(3) mandates that, if federal funds participate in the installation of warning devices, the State must install automatic gates with flashing lights if the high-risk conditions enumerated therein exist, 23 C.F.R. § 646.214 (b)(3)(i). Subsection (b)(3) only expressly requires an FHWA determination if the state highway agency seeks a waiver of the automatic-gate requirement; in such "individual cases where a diagnostic team justifies that gates are not appropriate, FHWA may find that the above requirements are not applicable." *Id.* § 646.214(b)(3)(ii).

Subsection (b)(4) likewise requires no specific determination by the FHWA of the conditions at particular crossings and the type of warning devices to be installed. Where "the requirements of § 646.214(b)(3) are not applicable," *id.* § 646.214(b)(4)—*i.e.*, where the State is seeking to use federal funds for passive warning devices (or active devices other than gates)—subsection (b)(4) provides that "the type of warning device to be

installed, whether the determination is made by a State . . . agency, and/or the railroad, is *subject to the approval* of FHWA." *Id.* (emphasis added). See *Easterwood*, 507 U.S. at 666-67. This language is critical; it affirmatively does not require (as the Sixth Circuit wrongly assumed) that "the Secretary or one of his agents actually determine[] . . . that only passive warnings were needed pursuant to (b)(4)," Pet. App. 13a. Rather, the regulation reserves to the FHWA the power to veto the warning devices selected by the state agency or railroad. Nothing in the regulation specifies how the FHWA official responsible for project oversight shall exercise that authority, or what determinations he must make personally in order to approve a warning-device installation project.

This reservation of discretion to the FHWA in section 646.214(b) as to how to conduct oversight of federally funded crossing projects makes sense in light of the overall design of the Section 130 crossing program, which the Sixth Circuit failed to consider. FHWA project approvals are done in the field; the 1987 TDOT installation project at issue in this case, for example, was approved by the Division Administrator for Tennessee. See J.A. 128. The FHWA Divisions are paired with a single State department of transportation [18] and are deeply familiar with the State's processes, by operation of law and as a matter of practice. Federal law requires the States to make annual reports to the Secretary on their crossing programs, 23 U.S.C. § 130(g), and the FHWA (as delegatee of the Secretary) must in turn report annually "on

[18] The FHWA currently has 52 divisions (one for each State, the District of Columbia, and Puerto Rico) located in the same city as the state department of transportation with which it partners. *See* Federal Highway Administration, U.S. Dep't of Transportation, *FHWA Field Offices* (last modified Oct. 5, 1999) <http://www.fhwa.dot.gov/field.html#fieldsites>.

the progress being made by the State[s] in implementing projects to improve railway-highway crossings," and "analyze and evaluate each State program [and] identify any State found not to be in compliance with the schedule of improvements required by subsection (d)." *Id.* In 23 C.F.R. § 924, the FHWA has "outlined the basic components which must be part of all programs and has listed key elements which must be included in the processes which make up these components." Establishment of Regulations, 44 Fed. Reg. 11,543, 11,544 (Mar. 1, 1979). Beyond establishing the components of the state program, the FHWA has monitored state programs by requesting not only the data mandated by Congress, but also "certain evaluation information administratively determined by the FHWA to be clearly necessary for the effective implementation of the safety improvement program," and "appropriate supplementary data . . . submitted annually by FHWA field offices." *Id.* The pattern of close FHWA involvement with the States was firmly established by the mid-1980's, because in the first decade of the federal Section 130 program the FHWA's "primary emphasis . . . [was] to assist the [States] in the development of their individual processes." Federal Highway Administration, U.S. Dep't of Transportation, *The 1987 Annual Report on Highway Safety Improvement Programs* 17 (1987). Indeed, in 1987, the FHWA was able to report that it had approved the processes of 49 States (including Tennessee) in operating their highway safety programs. *Id.* The very fact that States receive federal highway funds is proof that FHWA has approved their process. See 23 C.F.R. pt. 1206.

Given this program of highly integrated " 'cooperative federalism,' " see *New York* v. *United States*, 505 U.S. 144, 167 (1992); *King* v. *Smith*, 392 U.S. 309, 316 (1969); 23 C.F.R. § 1.3, it is unsurprising that regula-

tion 646.214(b) does not set an iron rule that for each project (no matter how many crossings are covered) an FHWA official must become immersed in the data of every single crossing and check the work of the state highway agency. The responsible FHWA official determines what degree of scrutiny is appropriate to ensure compliance with federal law (including the adequacy of devices) as a prerequisite to federal funding. 23 C.F.R. § 630.106(a); *id.* § 630.114(b) (1988). If the FHWA official has confidence in the State's systematic, technical processes for evaluating crossing conditions to comply with (b)(3) mandates and its track record in determining adequate crossing devices, nothing in the regulation requires a duplicative federal determination of crossing-specific conditions. The FHWA has discretion to rely on the determinations of the state agency as to whether (b)(3) conditions exist. On the other hand, the regulations also require the State to submit "plans, specifications, and estimates (PS&E), and supporting documents" for every federal project, *id.* § 630.201, which must "describe the location and design features and construction requirements in sufficient detail" for FHWA evaluation, *id.* § 630.205(b). The FHWA is free to prescribe the contents of those plans, specifications, and estimates. *Id.* § 630.205(a). Thus, the FHWA may make the actual determination of crossing conditions through this review process, if that is deemed necessary to ensure the adequacy of the warning devices installed. The regulations are designed to give the FHWA the maximum flexibility to ensure efficient and effective implementation of the Section 130 crossing program.

Even if it were not so clear from the text and structure of 23 C.F.R. § 646.214(b) that the FHWA may rely on state highway agency determinations of crossing conditions, the historical origin of the regulation lays the issue

to rest. Under 23 U.S.C. § (e), enacted decades before the Section 130 program, see *supra* at 6, the Department of Transportation long has had the responsibility of ensuring that warning devices at railway crossings within or near federal-aid highway projects meet federal adequacy standards before a project may be approved. Indeed, the adequacy standards of 23 C.F.R. § 646.214(b) are simply modifications of the longstanding standards that the Secretary developed under section 109 and that were published in Bureau of Public Roads, U.S. Dep't of Commerce, Policy and Procedures Memorandum 21-10, *Elimination of Hazards of Railway-Highway Crossings* (1958) ("PPM 21-10"). See Reimbursement for Railroad Work and Railroad-Highway Projects, 40 Fed. Reg. 16,057, 16,057 (Apr. 9, 1975).

Under the FHWA's traditional practice, the FHWA set the standards of adequacy of warning devices for specified crossing conditions, but commonly relied upon an expert state agency's determination of whether those conditions existed at a particular crossing. The 1958 version of PPM 21-10, at the time issued by the Bureau of Public Roads (the predecessor of the FHWA), is illustrative. PPM 21-10 states that "[i]nstallations of protective devices, when made in accordance with the following standards and controls, will be considered as complying with the safety standards determined by the United States Bureau of Public Roads as being adequate at that time." PPM 21-10 ¶ 20(c). Among those standards was the following mandate:

> All grade crossings of highways with (a) multiple main line railroad tracks; (b) multiple track crossings with or without main tracks on which more than one train may occupy the crossing at the same time; (c) single or multiple track crossings where operating speeds are 70 miles per hour or greater and sight distances are restricted; are to be protected with flashing light signals with short-arm gates.

Id. ¶ 20(c)(4). For all other crossings, PPM 21-10 provided that

> "in States where authority and responsibility for determination of the type of protective device has been delegated by State law to a public utilities commission or other similar State agency, *the findings and recommendations of such authorized commission or agency will, if made, be accepted by the Bureau of Public Roads even if of a general or Statewide nature and not for a specific project,* provided such findings and recommendations are concurred in by the State highway department.

Id. ¶ 20(c)(5) (emphasis added). In the absence of any findings and recommendations, or of delegation of state authority to such commission or agency, the Bureau of Public Roads and state highway agency would reach agreement as to what type of device would be acceptable. *Id.* ¶ 20(c)(5) & (6). Thus, it has long been the practice of the FHWA (and its predecessor) to accept the determinations of an expert state agency in approving the adequacy of protective devices.

PPM 21-10 continued into the 1970's largely unchanged. In March, 1973 (during the time the Highway Safety Act of 1973 was being considered), the FHWA issued a notice urging its Regions and Divisions to promote the use of automatic gates at certain kinds of crossings other than the three at which they were mandatory:

> Special consideration should be given to using gates at crossings with any of the following characteristics:
>
> 1. High vehicle and train traffic volumes.

2. High train speed.
3. High approach vehicle speed.
4. Moderately high combination of volume and speed.
5. Usage by school buses and/or vehicles transporting hazardous materials.
6. Other high hazard characteristics, such as continuing accident occurrences even though active protection devices are in place.
7. Crossings used by through trains where switching operations take place in proximity to the crossing.

Federal Highway Administration, U.S. Dep't of Transportation, HNG-14, *Notice: Elimination of Hazards of Railroad-Highway Grade Crossings—Use of Automatic Gates* (1973).

In promulgating its warning-device regulation in 1975, the FHWA expanded the category of crossings for which automatic gates were mandatory, incorporating certain of the "special consideration" conditions from the 1973 Notice. See 23 C.F.R. § 646.214(b)(3)(i).[19] For crossings where automatic gates were not mandatory, the state agency's findings and recommendations are no longer conclusive, as they had been under PPM 21-10, but rather the selection of devices is "subject to [FHWA] approval." *Id.* § 646.214(b)(4). But nothing in the regulation (or in the FHWA's implementation of the regulation since

[19] Shortly after 23 C.F.R. § 646.214 was promulgated, the FHWA issued instructions that PPM 21-10 was superseded. *See* Federal Highway Administration, U.S. Dep't of Transportation, Transmittal 129, *Federal-Aid Highway Program Manual* (Apr. 25, 1975). Petitioner has lodged with the Court the documents provided by FHWA that trace the history of PPM 21-10 until its supersession. The 1973 Notice has also been lodged with the Court.

1975) suggests that the FHWA departed from its historic practice of relying on expert state determinations in approving the adequacy of warning devices.[20]

Indeed, any other approach would be unworkable over the vast national network of highways that receive federal highway funds. Under the federal highway program, the Secretary of Transportation must ensure that the facilities selected for every project are the "best suited" for adequate safety, durability, and economy of maintenance, 23 U.S.C. § 109(a); that signage and traffic signals on federally funded highway projects "will promote the safe and efficient utilization of the highways," *id.* § 109(d), and, in particular, that protective devices are adequate at any railway crossing within or near a federal-aid highway project or where federal funds participate in the installation of the devices, *id.* § 109(e); 23 C.F.R. § 646.214(b)(3)(i). There have been more than 30,000 grade crossing projects since 1974, *1996 Annual Report* at IV-2, many involving hundreds of crossings in a single project (like the 1987 TDOT project); there have been countless other federal-aid highway projects where the adequacy of nearby crossing protective devices had to be approved under 23 U.S.C. § 109(e). It would be unrealistic and

[20] It should be noted that, of the (b)(3) criteria for identifying crossings where gates and flashers are mandatory, only one is determinate. *See* 23 C.F.R. § 646.214(b)(3)(i)(A) ("Multiple main line tracks"). The rest are either general guidelines or require the application of judgment, and the FHWA has traditionally allowed individual States latitude in applying them. For example, one criterion for mandatory gates and flashers is the presence of "substantial numbers of schoolbuses or trucks carrying hazardous materials." *Id.* § 646.214(b)(3)(i)(E). The FHWA has refused to use quantifiable measures to further define this criterion, and has left it to the States to determine, based on their own methodology and factfinding, when those numbers become substantial enough to make a crossing hazardous. *See* Establishment of Regulations, 44 Fed. Reg. 11,543, 11,543 (1979).

wasteful, and contrary to congressional policy to "prevent needless duplication and unnecessary delays" in the administration of the federal highway program, 23 U.S.C. § 101(e), for the FHWA to replicate the work done by state highway agencies by "actually determin[ing]," Pet. App. 13a, independently what protective devices should be installed at all these crossings. Contrary to the Sixth Circuit's assumption, that has never been the FHWA's practice, and that is not what 646.214(b) requires.

The Sixth Circuit simply refused to recognize that the Section 130 Railway Crossings Program is a federal-state partnership, one where the state has principal authority for selecting warning devices, and the FHWA acts in a rule-setting and oversight capacity. The FHWA mandates gates and flashers for certain kinds of crossings under (b)(3), and retains the right of approval for all others under (b)(4). Under (b)(4), the FHWA may rely on the state agency's findings in approving federal funding for devices, but that does not alter the fact that the devices "have, by definition, been specifically found to be adequate under a regulation issued by the Secretary." *U.S. Easterwood Br.* at 24. See also, *e.g.*, *Armijo* v. *Atchison, Topeka & Santa Fe Ry. Co.*, 87 F.3d 1188, 1190 (10th Cir. 1996) (authorization of federal funding for passive warning devices under (b)(4) is "tantamount to a determination . . . that only passive, rather than active, warning devices [a]re sufficient"); *Hester* v. *CSX Transp., Inc.*, 61 F.3d 382, 387 (5th Cir. 1995). This is not a mere "fiction of constructive approval," as the Sixth Circuit repeatedly mischaracterizes it, see Pet. App. 14a, 18a; it is the approval called for by 23 U.S.C. § 109(e) and the FHWA regulations. Nor is there any basis for the Sixth Circuit's cavalier statement that, absent an FHWA official's determination of what device is required for a particular crossing, "no one is responsible for the safety of motorists who use the crossing," *id.* at 16a. That demeans

the state highway agencies whose efforts in implementing the Section 130 program are the principal reasons for its overwhelming success, and it betrays the court of appeals' blatant disregard of the integrated federal-state structure of the program.[21]

In sum, the Sixth Circuit's analysis of this issue is wrong, both because it conflicts with *Easterwood* and because it misreads the statute and the regulation, which were properly interpreted in *Easterwood*. The FHWA warning-device regulation covers the subject matter of state tort law because it relegates the railroad's role in selecting warning devices to participating in diagnostic teams, and as a matter of federal law it defines a decision process in which the FHWA has final authority. *Easter-*

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[21] The Sixth Circuit's opinion is riddled with other logical errors and unfounded assertions that are contrary to the statutory and regulatory scheme. First, the court of appeals reasoned that railroads "get a huge benefit if they work with the state to take the desired action" to obtain federal funds, Pet. App. 18a; this simply ignores the determination of Congress and the FHWA that grade crossing improvements confer no net benefit on railroads. 23 U.S.C. § 130(b); 23 C.F.R. § 646.210(a), (b)(1). Second, the Sixth Circuit wrongly characterized the FHWA regulation on adequate devices as "a system of incentives" for the states and the railroads, remarking that "[i]t takes nothing more than a rudimentary understanding of economics to see that an incentive-based system does not work unless the reward is somehow tied to performance of the desired action." Pet. App. 17a-18a. But the regulation is not a system of incentives at all to guide railroad decisionmaking, but instead (as this Court said in *Easterwood*) the system embodies rules that "displace state and [railroad] decisionmaking." 507 U.S. at 670; *Union Pac. R.R. Co.* v. *Sharp*, 952 S.W.2d 658, 667 (Ark. 1997) (the regulation strips decisionmaking authority from the railroad and gives it to the FHWA). Furthermore, under the Sixth Circuit's erroneous approach, the purported "incentive" of preemption is not tied to any "performance of desired action" by the railroad, as it claimed. Rather, under its test, preemption depends on the action that a FHWA official takes regarding a particular crossing, over which the railroad has no control.

wood, 507 U.S. at 671; see also *Bock* v. *St. Louis Southwestern Ry. Co.*, 181 F.3d 920, 923 (8th Cir. 1999), *petition for cert. filed*, 68 USLW 3234 (U.S. Sept. 27, 1999) (No. 99-538) (" 'the issue is not what warning system the federal government determines to be necessary, but whether the final authority to decide what warning system is needed has been taken out of the railroad's and the state's hands' ") (alteration omitted) (quoting *Armijo* v. *Atchison, Topeka & Santa Fe Ry. Co.*, 87 F.3d 1188, 1192 (10th Cir. 1996)). Under FRSA, the regulation itself preempts state law, see 49 U.S.C. § 20106, and therefore preemption occurs whenever the regulation is applicable (*i.e.*, when federal funds participate in the installation of warning devices). *Easterwood*, 507 U.S. at 670. Because federal funds participated in the installation of warning devices at Oakwood Church Road crossings, respondent's state-law claims against petitioner regarding the adequacy of warning devices are preempted.

III. THE SIXTH CIRCUIT'S RULE IMPOSES AN IMPOSSIBLE BURDEN ON RAILROADS BECAUSE ALL RELEVANT EVIDENCE IS UNOBTAINABLE UNDER 23 U.S.C. § 409.

The Sixth Circuit's rule is not only incompatible with *Easterwood*, the FRSA, and the language, structure, and history of the FHWA warning-device regulations, but it also effectively nullifies *Easterwood* because it makes preemption literally impossible to establish. It creates the irrational situation where a railroad must defend the adequacy of a federally installed warning device when all evidence relevant to preemption is legally inadmissible and not even discoverable.

Under the Sixth Circuit's rule, a railroad can only establish preemption if it proves, not only that federal funding for the project was approved, but also that "the Secretary or one of his agents actually determined that

active warnings were needed pursuant to (b)(3) or that only passive warnings were needed pursuant to (b)(4)." Pet. App. 13a; see *id.* at 22a. This rule nullifies *Easterwood* preemption for three reasons.

First, as previously discussed, the regulation does not require that the FHWA actually make these crossing-specific determinations, and as a general rule the FHWA does not do so; it relies on the state highway agencies.[22]

Second, because this is not the practice of the FHWA, evidence of a determination regarding a specific crossing (that the Sixth Circuit wrongly assumed that FHWA officials make) simply does not exist, and as a practical matter railroads could never establish an *Easterwood* preemption defense under this rule. FHWA regulations make clear that, after the FHWA completes its review of any plans, specifications, and estimates, see 23 C.F.R. § 630.201-.205, typically the only documentation created is a project agreement between the State and the FHWA whereby the State binds itself, *inter alia*, to comply with all applicable federal statutes, regulations, and applicable FHWA policies and procedures, *id.* §§ 630.301-.303.[23] Such a standard-form project agreement was submitted in this case, J.A. 128, but was held insufficient by the Sixth Circuit to establish preemption. Pet. App. 22a. As a general rule, the evidence demanded by the Sixth Circuit—a separate "approval of the Secretary or his agent, of the use of passive warning devices at a particular crossing," *id.*—is a chimera of its imagination.

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[22] The FHWA approval in this case was in accord with general practice. An FHWA official submitted an affidavit that it relied on TDOT to determine the warning devices that were proper in the project at issue. J.A. 125-26.

[23] Federal regulations require an authorization to proceed as well as a project agreement, *see* 23 C.F.R. § 630.106, but the two documents may be combined, *id.* § 630.303(c).

Third, even if such a crossing-specific "approval" report did somehow exist, federal law clearly prohibits the discovery or use of such evidence in actions such as this one. 23 U.S.C. § 409 provides:

> Notwithstanding any other provision of law, reports, surveys, schedules, lists, or data compiled or collected for the purpose of identifying, evaluating, or planning the safety enhancement of potential accident sites, hazardous roadway conditions, or railway-highway crossings, pursuant to sections 130, 144, and 152 of this title or for the purpose of developing any highway safety construction improvement project which may be implemented utilizing Federal-aid highway funds shall not be subject to discovery or admitted into evidence in Federal or State court proceeding or considered for other purposes in any action for damages arising from any occurrence at a location mentioned or addressed in such reports, surveys, schedules, lists, or data.[24]

23 U.S.C. § 409.

Federal and state courts applying § 409 have interpreted this prohibition broadly, inferring that it is designed "to 'facilitate candor in administrative evaluations of highway safety hazards,'" *Harrison* v. *Burlington Northern Railroad Co.*, 965 F.2d 155, 160 (7th Cir. 1992); *Robertson* v. *Union Pacific Railroad Co.*, 954

[24] Section 409 was enacted as part of the Surface Transportation Act of 1987, Pub L. No. 100-17, § 132(a), 101 Stat. 132, 170. Congress has amended § 409 twice since it was enacted, both times expanding its scope. Intermodal Surface Transportation Efficiency Act of 1991, Pub. L. No. 102-240, § 1035(a), 105 Stat. 1914, 1978 (adding that protected information shall not be "subject to discovery" as well as being inadmissible in civil cases); National Highway System Designation Act of 1995, Pub. L. No. 104-59, § 323, 109 Stat. 568, 591 (including data "collected" in addition to "data compiled" among the types of protected information).

F.2d 1433, 1435 (8th Cir. 1992), and "to prohibit federally required record-keeping from being used as a 'tool . . . in private litigation,'" *Robertson*, 954 F.2d at 1435 (omission in original); *Light* v. *State*, 560 N.Y.S.2d 962, 965 (N.Y. Ct. Cl. 1990). Thus, for example, courts have held excluded under § 409: government officials' evaluations of safety conditions at specific crossings, *Harrison*, 965 F.2d at 159; *Sawyer* v. *Illinois Central Gulf Railroad Co.*, 606 So. 2d 1069, 1072-73 (Miss. 1992); letters from government officials recommending safety devices at specific sites, *Sawyer*, 606 So. 2d at 1072-73; *Miller* v. *Bailey*, 621 So. 2d 1174, 1182 (La. Ct. App. 1993); and even a newspaper article using safety data compiled by state officials relating to a particular crossing, *Robertson*, 954 F.2d at 1434-35.

Under the plain terms of § 409, any determination by FHWA, in relation to a request for Federal funds, that a specific crossing either (a) requires active warning devices under 23 C.F.R. § 646.214(b)(3), or (b) may maintain a passive warning system under (b)(4), would be undiscoverable and inadmissible. Such a determination by FHWA, if recorded, would be part of a "report[]," "survey[]," or "list[]," and would reflect "data compiled or collected." 23 U.S.C. § 409. Such information would have been prepared for "the purpose of identifying, evaluating, or planning the safety enhancement of . . . railway-highway crossings." *Id.* And finally, it would have been prepared "for the purpose of developing [a] highway safety construction improvement project which may be implemented utilizing Federal-aid highway funds," as well as prepared "pursuant to section[] 130" of Title 23 (authorizing the Secretary of Transportation to evaluate railway-highway crossing projects, and to determine federal funding for such projects). *Id.* Accordingly, § 409 requires that such evidence "*shall not be subject to discovery or admitted into evidence* in a Federal or State court pro-

ceeding *or considered for other purposes* in any action for damages arising from any occurrence at [the site]." *Id.* (emphases added). The Sixth Circuit's strained interpretation to the contrary, developed to avoid the implications of its erroneous preemption rule, cannot withstand scrutiny.

Section 409 also highlights the irrationality of the Sixth Circuit approach, compared to the proper working of *Easterwood* preemption. The thrust of the Section 130 program, and the preemptive 1975 FHWA regulations defining federal standards and procedures for ensuring the adequacy of warning devices selected by the State, has been to make the installation of federally funded warning devices a matter of rational, expert determination based on hard evidence and traffic engineering analysis. The bright-line rule of *Easterwood*, where preemption turns on the applicability of federal-law requirements that accompany federal funding of crossing projects, fosters this goal. When the FHWA approves installation of the devices with federal funds, the crossing is in effect "federalized" and any independent state-law duty of the railroad to determine the adequacy of warning devices is preempted; the railroad's involvement is limited to participation in a diagnostic team that the State may assemble for a crossing, *CSX Transportation, Inc.* v. *Easterwood*, 507 U.S. 658, 671 (1993), but only if such participation is invited by the State. After the federally funded devices are installed, it is the State that has the duty under the Section 130 crossing program to monitor the crossing to determine if additional devices are needed, and to schedule any required upgrade projects. And the States and the railroads have their respective federal duties to update the crossing inventory to ensure that the proper information is supplied for hazard evaluation. This system has worked remarkably well, as the continuing decline in accident and

fatality rates attests. See *supra* at 18-19. Indeed, based on technical analysis, the States have in fact continuously upgraded crossings where the existing devices had been installed with federal funds. See, *e.g.*, *Bock* v. *St. Louis Southwestern Ry. Co.*, 181 F.3d 920, 921 (8th Cir. 1999), *petition for cert. filed*, 68 USLW 3234 (U.S. Sept. 27, 1999) (No. 99-538); *Armijo* v. *Atchison, Topeka & Santa Fe Ry. Co.*, 87 F.3d 1188, 1192 (10th Cir. 1996).

The *Easterwood* scheme is sound public policy: each entity is at all times aware of its responsibility for protecting the public, and is not left to litigate an alleged responsibility at some indefinite future time after someone is killed or injured. Under the Sixth Circuit's approach, not only does § 409 preclude the railroads from establishing *Easterwood* preemption, but it also bars them in the trial on the merits from discovering or introducing into evidence any of the data, reports, or surveys that might prove that reasonable care was used in the selection of the devices. If the rule of the Sixth Circuit stands, railroads can only defend themselves by engaging in wasteful duplication of the States' survey and hazard analyses of the nation's more than 158,000 public grade crossings, *1998 Safety Report* at 9-7 (Table 9-2). This is contrary to reason and the federal scheme that Congree so carefully crafted.[25]

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[25] *Easterwood* preemption of state-law claims that the devices installed were inadequate does not eliminate a railroad's tort liability regarding grade crossings. Railroads would remain responsible in tort for injuries caused by their failure to meet their federal safety responsibilities (such as fraud or negligence in performing these assigned tasks in the federal crossing inventory program), as well as other state law responsibilities that are not preempted. Under federal law, railroads have a duty, *inter alia*, to participate in state highway improvement programs (23 C.F.R. pt. 924), to keep warning devices in proper working order (49 C.F.R. pt. 234), to trim vegetation along their tracks to ensure proper visibility (*id.* at § 213.37), and to travel within federally

This Court stated the proper rule in *Easterwood*. The FHWA warning-device regulation set forth at 23 C.F.R. § 646.214(b) imposes federal-law requirements on the process of selecting warning devices and reserves final authority in that process to the FHWA. *Easterwood*, 507 U.S. at 670-71. The regulation covers the subject matter of a railroad's state tort law duties of care in the selection of devices, and therefore preempts that law whenever the regulation applies. *Id.* at 670. It applies to all projects in which federal funds participated in the installation of warning devices, *id.* at 671, such as the 1987 TDOT project at issue here, and thus respondent's inadequate-device state law claims are preempted.

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imposed speed limits (*id.* at §§ 213.9, 236.501-.505). Railroads may be held liable under state law for negligence in the construction or maintenance of selected devices, *see, e.g., Ingram* v. *CSX Transportation, Inc.*, 164 F.3d 858, 866 (11th Cir. 1998) (discussing *Michael* v. *Norfolk Southern Railway Co.*, 74 F.3d 271, 273 (11th Cir. 1996)), among a host of other negligence theories. Thus, there is no dispute that Ms. Shanklin is entitled on remand to a trial on her three remaining theories of petitioner's liability under state law: namely, the alleged failure of petitioner to (1) sound the horn in a timely fashion; (2) apply the brakes in a timely fashion; and (3) remove vegetation from the crossing. *See* Pet. App. 2a.

CONCLUSION

The Court should reverse the judgment below.

Respectfully submitted,

WILEY F. MITCHELL, JR.
CELIA C. LOVELL
NORFOLK SOUTHERN CORPORATION
Law Department
Three Commercial Place
Norfolk, Virginia 23510
(757) 629-2842

CARTER G. PHILLIPS *
G. PAUL MOATES
STEPHEN B. KINNAIRD
JOHN E. FEE
SIDLEY & AUSTIN
1722 Eye Street, N.W.
Washington, D.C. 20006
(202) 736-8000

EVERETT B. GIBSON
BATEMAN GIBSON & CHILDERS, L.L.C.
1010 Cotton Exchange Building
65 Union Avenue
Memphis, TN 38103
(901) 526-0412

Counsel for Petitioner

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* Counsel of Record